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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CITY OF POCATELLO, CITY OF IDAHO
FALLS, CITY OF BLISS, CITY OF BURLEY,
CITY OF CAREY, CITY OF DECLO, CITY
OF DIETRICH, CITY OF GOODING, CITY
OF HAZELTON, CITY OF HEYBURN,
CITY OF JEROME, CITY OF PAUL, CITY
OF RICHFIELD, CITY OF RUPERT, CITY
OF SHOSHONE, CITY OF WENDELL,
BINGHAM GROUND WATER DISTRICT,
BONNEVILLE-JEFFERSON GROUND
WATER DISTRICT, and MCCAIN FOODS
USA, INC.,

CV01-23-08258

Case No. _____

IDWR Docket No. CM-DC-2010-001

**CITY OF POCATELLO,
COALITION OF CITIES, CITY OF
IDAHO FALLS, BONNEVILLE-
JEFFERSON GROUND WATER
DISTRICT, BINGHAM
GROUNDWATER DISTRICT, AND
MCCAIN FOODS USA, INC.,
COMPLAINT FOR DECLARATORY**

Petitioners,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN, in his
capacity as Director of the Idaho Department of
Water Resources,

Respondents.

IN THE MATTER OF DISTRIBUTION
OF WATER TO VARIOUS WATER RIGHTS
HELD BY OR FOR THE BENEFIT OF A&B
IRRIGATION DISTRICT, AMERICAN
FALLS RESERVOIR DISTRICT #2,
BURLEY IRRIGATION DISTRICT,
MILNER IRRIGATION DISTRICT,
MINIDOKA IRRIGATION
DISTRICT, NORTH SIDE CANAL
COMPANY, AND TWIN FALLS CANAL
COMPANY

**RELIEF, PETITION FOR WRIT OF
PROHIBITION, AND PETITION
FOR WRIT OF MANDAMUS**

COMES NOW the City of Pocatello (“Pocatello”), by and through its attorneys of record, Somach Simmons & Dunn, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (“Coalition of Cities”), by and through their attorneys of record, Candice M. McHugh and Chris M. Bromley, the City of Idaho Falls (“Idaho Falls”), by and through its attorney of record, Robert L. Harris (collectively the “Cities”); Bingham Ground Water District (“Bingham”) by and through its attorney, Dylan Anderson; Bonneville-Jefferson Ground Water District (“Bonneville-Jefferson”), by and through its attorney Skyler Jones; and McCain Foods USA, Inc. (“McCain”), by and through its attorney of record Candice M. McHugh, (collectively the “Petitioners”) pursuant to I.C. §§ 10-1201 and 7-401 *et seq.*, and hereby file this *Complaint for Declaratory Relief, Petition for Writ of Prohibition, and Petition for Writ of Mandamus*

(“Complaint”) against Idaho Department of Water Resources (“IDWR” or “Department”) and Gary Spackman, in his capacity as Director of IDWR (the “Director”) (collectively the “Respondents”).

PARTIES

1. Petitioner Pocatello is a municipality incorporated in the State of Idaho, administered pursuant to I.C. § 50-101 *et seq.*, and located within Bannock County.
2. Petitioner Coalition of Cities are municipalities incorporated in the State of Idaho, administered pursuant to I.C. § 50-101 *et seq.*, and located within Blaine, Cassia, Gooding, Jerome, Lincoln, and Minidoka Counties.
3. Petitioner Bingham Ground Water District is a political subdivision organized pursuant to title 42, chapter 52 Idaho Code, whose members reside in Bingham County.
4. Petitioner Bonneville-Jefferson Ground Water District is a political subdivision organized pursuant to title 42, chapter 52 Idaho Code, whose members reside in Bonneville County, State of Idaho and part of Jefferson County, State of Idaho. Members of Bonneville-Jefferson irrigate using ground water.
5. Petitioner, McCain Foods USA, Inc., (“McCain”) is a corporation organized under the laws of the State of Maine and owns water rights in the state of Idaho that are located within Cassia County and are junior to December 31, 1953. McCain at the time the relevant orders were entered was not a member of any groundwater or irrigation district and did not have an approved mitigation plan.
6. Respondent IDWR is an executive department of the government of the State of Idaho. I.C. § 42-1701(1).

7. Respondent Gary Spackman is the Director of IDWR charged with administering the instant matter.

JURISDICTION AND VENUE

8. Jurisdiction is proper in this Court pursuant to I.C. §§ 10-1201 (declaratory judgment), I.C. §§ 7-401 *et seq.* (writ of prohibition), I.C. §§ 7-301 *et seq.* (writ of mandamus), I.R.C.P. 74, and Idaho Constitution, Art. V, § 20 (authorizing district courts to hear cases both in equity and at law).

9. This Court, sitting in Ada County, is the proper venue for this matter pursuant to I.C. §§ 5-402 and 67-5272 because it involves actions taken by the Director's in Ada County.

10. Pursuant to the Idaho Supreme Court's Administrative Order issued on December 9, 2009, this case should be reassigned to the presiding judge of the Snake River Basin Adjudication district court for further proceedings.

ALLEGATIONS COMMON TO ALL COUNTS

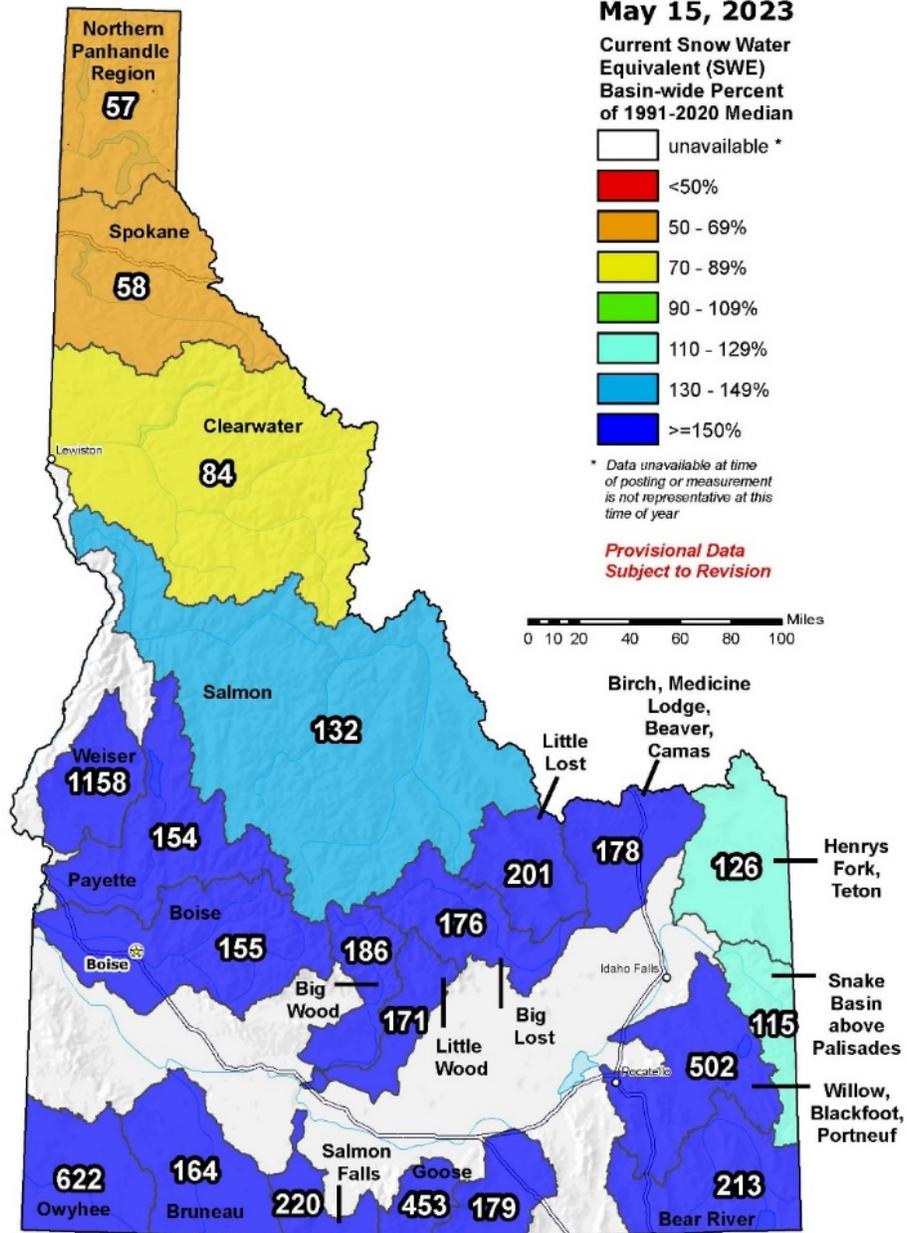
April 21, 2023 Orders and Hearing Deadlines Related to June 6-10, 2023, Hearing

11. On April 21, 2023, the Director issued two orders (collectively the "2023 Orders") regarding the Surface Water Coalition ("SWC") delivery call:
- a. *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover ("Fifth Methodology Order");* and
 - b. *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3) ("As-Applied Order")*¹.

¹ *See*, Declaration of Sarah Klahn, Exhibits A-1 and A-2.

12. The *Fifth Methodology Order* is a detailed, technical order, allegedly relying on the “best available science” to revise the Director’s predictive tools for determining material injury to SWC pursuant to the Rules for Conjunctive Management of Surface and Ground Water Resources (“Conjunctive Management Rules”). The Director decided in this *Fifth Methodology Order* to make a major departure from all prior decisions in the SWC delivery call to use the Eastern Snake Plain Aquifer Model (“ESPAM”) in transient as opposed to steady-state to predict the priority date for curtailment needed to satisfy that injury. See *Fifth Methodology Order* at 35, ¶ 19. The significance of this regulatory change cannot be overstated.
13. The Director also made a major change in the “Baseline Year” component of the methodology which is a significant departure from prior versions of the methodology.
14. The Director apparently did *not* attempt to verify the SWC irrigated acreage or account for SWC places of use also served by groundwater rights.
15. The Director took affirmative steps to increase the burden on juniors and made no effort to balance that with evaluations of the SWC operations contrary to IDWR’s Rules for the Conjunctive Management of Surface and Ground Water Resources.
16. The *As-Applied Order* uses the information from the *Fifth Methodology Order* and applies it to the first half of the 2023 irrigation season. Applying the *Fifth Methodology Order*, the *As-Applied Order* computes a “Demand Shortfall” of 75,200 acre-feet to Twin Falls Canal Company (“TFCC”) for the period April – July.

Idaho SNOTEL Current Snow Water Equivalent (SWE) % of Normal



The snow water equivalent percent of normal represents the current snow water equivalent found at selected SNOTEL sites in or near the basin compared to the average value for those sites on this day. Data based on the first reading of the day (typically 00:00).

Prepared by:
 USDA/NRCS National Water and Climate Center
 Portland, Oregon
<https://www.nrcs.usda.gov/wps/portal/wcc/home/>

https://www.wcc.nrcs.usda.gov/ftpref/data/water/wcs/gis/maps/id_swepctnormal_update.pdf

17. Using a transient modeling run, ESPAM predicts that ground water rights that are junior to December 30, 1953, will need to be curtailed to satisfy the predicted injury.
18. The Upper Snake Reservoir systems is expected to fill and with the mountains of eastern Idaho currently containing far more than 100% snow water equivalent (see map above).
See also, Declaration of Maximilian Bricker, Attachment E.
19. Neither the *Fifth Methodology Order* nor the *As-Applied Order* are issued due to an emergency.
20. The *Fifth Methodology Order* and the *As-Applied Order* are based largely on information that was developed internally by the Department and is not in the agency record of the contested case in which the *Fifth Methodology Order* was issued.
21. The Department issued the *Fifth Methodology Order* and the *As-Applied Order* on April 21, 2023, without holding a prior hearing in violation of the APA.
22. Also on April 21, 2023, the Director issued a *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery*², which authorized the parties “to immediately conduct and engage in discovery” and set:
 - a. A pre-hearing conference on the *2023 Orders* for April 28, 2023;
 - b. A hearing on the *2023 Orders* for June 6 – 10, 2023 (the “*2023 Orders Hearing*”); and
 - c. A deadline of May 5, 2023, for water users who were not part of an approved mitigation plan and who were junior to December 31, 1953, to submit proof “to

² Declaration of Sarah Klahn, Exhibit A-3.

the satisfaction of the Director” that they could mitigate for their portion of the forecasted shortfall.³

23. The Director’s June 6, 2023 hearing provides approximately six weeks for Petitioners to conduct discovery and prepare for an exceptionally complex matter with a large volume of technical data and analyses. This is insufficient time to prepare, given the changes to the Order.
24. On April 28, 2023, the Cities filed a *Motion for Continuance* to continue the hearing on the 2023 Orders until a date in December 2023 or January 2024, which was joined by Idaho Ground Water Appropriators, Inc. (“IGWA”), Bingham, Bonneville-Jefferson, and McCain. The Director orally denied the Motion for Continuance at the April 28, 2023, pre-hearing conference, and filed an *Order Denying the Appointment of an Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions*, on May 5, 2023. The Cities, IGWA, Bingham, and Bonneville-Jefferson filed a *Motion for Reconsideration of Denial of Continuance* on May 5, 2023.⁴
25. The *Motion for Continuance* and *Motion for Reconsideration of Denial of Continuance* requested a continuance on the grounds that:
 - a. Counsel and experts are unavailable during or immediately prior to the hearing:
 - i. Candice M. McHugh, is unavailable during the dates set for hearing because of a previously scheduled out of state obligation, leaving her partner, Chris M. Bromley, as the sole attorney representing the firm’s

³ By letter dated May 1, 2023, water right holders with priority dates junior to December 31, 1953, received “Notice of Possible Curtailment” McCain received its letter on May 12, 2023. A true and correct copy of the letter is attached as Exhibit A to the Declaration of Candice McHugh.

⁴ Declaration of Sarah Klahn, Exhibits A-6, A-33 and A-42.

clients Coalition of Cities, McCain, and Amalgamated. *See Declaration of Candice M. McHugh in support of Motion for Reconsideration of Denial of Continuance*, May 5, 2023.⁵

- ii. Greg Sullivan, expert consultant for the Cities, is out of the country from May 17, 2023 through June 3, 2023 and will be unavailable to consult with the Cities' attorneys to assist in developing strategy, prepare expert reports, prepare exhibits, and to attend depositions if the schedule even allows for depositions to occur. *See Declaration of Gregory K. Sullivan, P.E., in support of Motion for Reconsideration of Denial of Continuance*, May 8, 2023.
- iii. Sophia Sigstedt, expert consultant for IGWA, has a medical condition that leaves her unable to leave her home state of Colorado, until July 10, 2022, and limits her ability to perform work in the interim. *See Declaration of Sophia Sigstedt in support of Motion for Reconsideration of Denial of Continuance*, May 5, 2023.
- iv. Jaxon Higgs, expert consultant for IGWA, has a long-standing out-of-country vacation planned for May 27-June 10, 2023, and is unable to participate in the hearing currently scheduled for June 6-10, 2023. *See Declaration of Jaxon Higgs in support of Motion for Reconsideration of Denial of Continuance*, May 5, 2023.

⁵ Declaration of Sarah Klahn, Exhibits A-32, 34, 35, 40

- b. As documented in the Declarations of Thane Kindred, Bryce Contor and Skyler Johns,⁶ Petitioners cannot obtain all discovery from the SWC and IDWR necessary to formulate expert opinions and reports. Issues that may be raised as expert opinions in expert reports include but are not limited to the following:
- i. IDWR’s new reliance on transient modeling.
 - ii. IDWR’s reliance on new data. IDWR has added seven (7) years of additional, voluminous hydrologic and water use data to the datasets used in the *Fifth Methodology Order* and *As-Applied Order*. There is insufficient time available to properly review and vet these data and how they were used in the revised calculations;
 - iii. IDWR’s failure to properly identify the SWC’s irrigated acreage used in the determination of reasonable in-season demand;
 - iv. IDWR’s failure to consider TFCC’s increase in diversions over the last twenty years;
 - v. IDWR’s failure to consider changes in the efficiency of SWC operations;
 - vi. IDWR’s failure to apply CM Rule 20.03 and principles of reasonableness generally; and
 - vii. IDWR’s violation of due process rights of all interested water users:
 1. By engaging in an apparently sham public process related to the Department’s convening of the “Technical Work Group” to discuss modifications to the *Fourth Methodology Order*; and

⁶ See Declaration of Sarah Klahn, Exhibits A-32, 34-40.

2. By setting the hearing without regard to the time required for discovery and without consideration of the existing obligations of the parties, their legal representatives, and consultants.
 3. By not providing timely nor meaningful notice to water users who are subject to curtailment.
- c. Given this timing, it is impossible for Petitioners to conduct necessary site investigations or depose all relevant witnesses, both lay and expert.
 - d. The original delivery call was filed eighteen (18) years ago in 2005 with various proceedings and an administrative hearing occurring in 2008. Water use, irrigation practices, and irrigated area have materially changed in the intervening fifteen (15) years.
 - e. Whether IDWR is using the “best available science” to administer junior-priority water rights, juniors, is a question of fact.
 - f. Junior-priority water right holders, who have due process rights in delivery calls, must be afforded a fair opportunity to examine the use of the best available science to evaluate the SWC’s current water use. *See Declaration of Gregory K. Sullivan, P.E., in support of Motion for Reconsideration of Denial of Continuance, May 8, 2023.*⁷
 - g. A drought is not predicted for the 2023 irrigation season. Meanwhile, Mitigation has been secured for the upcoming season, thereby causing little to no prejudice

⁷ Declaration of Sarah Klahn, Exhibit A-40.

to senior users. *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* at 1 (May 4, 2021).

- h. The Director has authority to administer out of priority junior diversions pursuant to the *Fourth Methodology Order*. See *Motion for Reconsideration of Denial of Continuance* at 7 (May 5, 2023).⁸
 - i. Petitioners will not object to the Director implementing the *2023 Orders* and pursuing curtailment of non-mitigated groundwater users this season. *Id.*
 - j. Rescheduling the hearing saves all parties and IDWR time, money and expense and honors the civility and professional conduct of the legal profession.
26. On April 28, 2023, at 1:30 p.m., the Director held the pre-hearing conference on the *2023 Orders*, during which he gave counsel for Petitioners “one minute” to argue in support of the *Motion for Continuance*. Tr. 15:7-13.
27. The Director orally denied the *Motion for Continuance*, except to the extent of continuing the hearing to a date within the first three weeks of June 2023, if the SWC would stipulate to do so, which counsel for the SWC declined. The Director stated:

I intend to hold a hearing for this matter in the first three weeks of June 2023. And this particular Methodology Order – so if within that period of time the parties can find dates that are acceptable to them for a hearing, I’m willing to consider it. But that’s the narrow window of time that I’m willing to work within. Now, let me go back to the arguments that were presented regarding preparation and familiarity with the information that’s contained in the Fifth Methodology Order.

April 28, 2023 Tr. 19:24-20:9.⁹

28. At the pre-hearing conference, the Director also stated:

⁸ Declaration of Sarah Klahn, Exhibit A-31.

⁹ Declaration of Sarah Klahn, Exhibit A-45.

The Department of Water Resources notified all of the parties last fall that we would be reviewing the information and presenting that. All of the parties' expert witnesses were invited to attend, and there were multiple presentations of that evidence, and also some conclusions drawn by technical staff about what – what information would be reviewed in the Methodology Order.

April 28, 2023 Tr. 20:10-20:19.¹⁰

29. The Director also designated two department witnesses: Jennifer Sukow and Matt Anders and stated “those two witnesses will be questioned at the hearing and as a preliminary matter to work through the documents themselves, and also talk about the information and will be subject to examination.” April 28, 2023 Tr. 28:2-5.¹¹
30. On May 2, 2023, the Director issued a *Scheduling Order and Order Authorizing Remote Appearance at Hearing* (the “*Scheduling Order*”)¹² setting dates as such:
- a. May 5, 2023:
 - i. Deadline for the Department to identify materials Ms. Sukow and Mr. Anders may rely upon at the hearing;
 - ii. Deadline for the Department to summarize topics Ms. Sukow and Mr. Anders will testify about at the hearing; and
 - iii. Deadline for the parties to submit to the Department a written statement of proposed issues for the hearing.¹³
 - b. May 10, 2023: Deadline for the Department to augment its above-mentioned list of materials Ms. Sukow and Mr. Anders may rely on at the hearing, if needed.

¹⁰ *Id.*

¹¹ *Id.*

¹² Declaration of Sarah Klahn, Exhibit A-10. Remote participation however is limited to observing the proceedings; the Director has prohibited active remote participation, such as questioning witnesses or testifying.

¹³ Between April 28 and May 5, 2023, Petitioners complied with this deadline. The issues identified for hearing included IDWR's violation of due process rights of all interested water users, which are more fully described in each individual request for hearing. Declaration of Sarah Klahn, Exhibits A-4, 7-9, 13, 16, 17, 26, 28.

- c. 7 Days Prior to Hearing Day 1:
 - i. Deadline for the parties to complete all discovery.
 - ii. Deadline for the parties to deliver copies of their expert reports to the other parties.
 - iii. Deadline for the parties to exchange and file with the Department their proposed lay and expert witness lists. The parties should include a general summary of each witness' anticipated testimony.
 - iv. Deadline for the parties to exchange and file with the Department their proposed exhibit lists.
 - d. Hearing Day 1: Prior to the start of the hearing, the parties shall submit to the Department three physical copies of their pre-marked and numbered, proposed hearing exhibits.
31. On May 4, 2023, Cities, IGWA, Bonneville-Jefferson, and Bingham filed Joint Notices of Deposition Duces Tecum of Jennifer Sukow, P.E., P.G., and Matthew Anders, P.G., which scheduled the depositions for May 10 and May 12, 2023, respectively.¹⁴
32. On May 5, 2023, the Director issued two orders:
- a. *The Notice of Materials Department Witnesses May Rely Upon at the Hearing and Intent to Take Official Notice* (the “*Notice of Materials*”)¹⁵ both identifies witness-specific materials and limits the topics and data that Department witnesses may discuss at the hearing, thereby precluding Petitioners from

¹⁴ Declaration of Sarah Klahn, Exhibits A-18 and 19.

¹⁵ Declaration of Sarah Klahn, paragraphs vv-xx.

examining other topics and information the Director relied upon in developing the *Fifth Methodology Order*.

b. The second was the *Order Denying the Cities' Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* ("Denial of Independent Hearing Officer Order")¹⁶:

i. First, reiterating the Director's oral ruling at the April 28, 2023, pre-hearing conference denying Petitioners' request for a continuance:

[L]ast fall the Department conducted multiple presentations regarding possible amendments to the [*Fourth Methodology Order*]. The Director also reminded the parties he had, multiple times, publicly expressed his intention to revisit the *Fourth Methodology Order*. . . . The Director reaffirms his denial of the Cities' Motion for Continuance

(emphasis added).

ii. Second, limiting the scope of discovery by precluding Petitioners from asking "questions regarding the Director's deliberative process on legal and policy considerations."¹⁷

iii. Third, declining to satisfy Petitioners' request for a rule 30(b)(6) deposition.

33. On May 5, 2023, Cities, IGWA, Bonneville-Jefferson, and Bingham filed a *Motion to Reconsider*, which requests the Director to reconsider his finding of material injury of

¹⁶ Declaration of Sarah Klahn, Exhibit A-33.

¹⁷ This limit on the scope of depositions comports with the Director's statements at the April 28, 2023 pre-hearing conference:

Well, for me to extend the opportunity for discovery to those people within a circle that are writing the document itself, TJ, I wrote the document. I signed it. And I don't work in a vacuum. I have staff that assists me. And I'm -- I'm not -- I'm not making myself and other staff and those discussions available unless you can -- you can articulate a reason why I should. So this is an evidentiary hearing. And the evidence should relate to the facts and the data and the process by which -- and when I say "process," I mean the technical analysis that led to the decision.

Tr. 34:19-35:5. The theme continued during Department depositions.

75,200 acre-feet to Twin Falls Canal Company (“TFCC”) based on the fact that if the irrigated acres for TFCC that was discussed during the Technical Work Group were used in the 2023 Orders, the Director would not have found material injury.¹⁸

The “Technical Work Group” Process

34. The Director’s remarks at the Prehearing Conference and in various Orders filed in this matter to date suggest that the Department believes the due process Petitioners seek was already provided through the activities of the Technical Work Group (“TWG”).
35. Contrary to the Director’s statements, the TWG did *not* preview the modifications contained in the *Fifth Methodology Order* and was a wholly inadequate basis to inform groundwater users of the Department’s eventual modifications to the Methodology Order.
 - a. First, there was no formal notice to the parties to the SWC Delivery Call that the Director was planning to modify the *Fourth Methodology Order*. Instead, the Director announced in a status conference held August 5, 2022 (a status conference concerning an unrelated issue) that he intended to instruct Department staff to review the *Fourth Methodology Order* for potential improvements.
 - b. The Director did not hold a status conference with the parties to the contested case to explain how the Department’s review of the *Fourth Methodology Order* would comply with the Idaho Administrative Procedures Act (“APA”), Chapter 52, Title 67, Idaho Code, or issue a scheduling order or any other document

¹⁸ The *Motion to Reconsider* material injury remains at issue. See, Declaration of Sarah Klahn, Exhibit A-36.

describing the process by which a hearing would be held and an agency record developed to support potential changes to the *Fourth Methodology Order*.

- c. Instead the Department spent 10 to 12 months reviewing data and considering updating the methodology. Matt Anders, P.G. Deposition, Tr. 134:24 – 135:8.¹⁹
- d. In October 2022, the Department invited IGWA, SWC, and Pocatello technical experts, to a series of on-line Zoom meetings. Tr. 39:24 – 44:15.²⁰
- e. On information and belief, the experts met approximately seven times between November 15 and December 15.
- f. The TWG meetings culminated in a December 23, 2022 memo from Mr. Anders to the Director (“Methodology Recommendations”) recommending the Methodology Order be modified by: 1) updating the Baseline Year for purposes of evaluating Reasonable In-Season Demand; 2) update the Baseline Year for purposes of determining Reasonable Carryover; and 3) update the process for determining Project Efficiencies relying on a different rolling average.²¹
- i. The Methodology Recommendations affirmatively did *not* recommend other updates (including a move from steady-state to transient modeling) and simply stated that “IDWR would continue to evaluate the integration” of these modifications into the Methodology. *Id.*
- ii. Further, the Methodology Recommendations failed to provide any analysis of why certain critical Methodology provisions were *not* modified—for example, the use of irrigated acres reported by Twin Falls

¹⁹ Declaration of Sarah Klahn, Exhibit A-46.

²⁰ *Id.*

²¹ Declaration of Maximilian Bricker, Exhibit A.

Canal Company as opposed to the acres actually irrigated by Twin Falls Canal Company. *See Declaration of Gregory K. Sullivan, P.E., in support of Motion for Reconsideration of Denial of Continuance*, May 8, 2023.²².

iii. The TWG participants were given roughly three weeks to respond to the Department's Recommendations.²³

36. After the TWG participants submitted comments on the Methodology Recommendations²⁴, the Department went silent, although deposition testimony suggests the Department was working behind closed doors to update the Methodology. It was not until the Orders issued on April 21, 2023, that the TWG participants²⁵ were made aware of the changes the Department in fact *did* adopt to the Methodology.

COUNT I

REQUEST FOR DECLARATORY RELIEF: IDWR'S PROPOSED ADMINISTRATIVE PROCEEDING AND PROCESS VIOLATES THE IDAHO ADMINISTRATIVE PROCEDURE ACT

37. Petitioners re-allege and incorporate the preceding paragraphs by reference as though set forth fully.

38. This matter concerns the Director's: (1) April 21, 2023 Orders; 2) *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery*, (2) *Scheduling Order and Order Authorizing Remote Appearance at Hearing*, (3) *Notice of Materials*

²² Declaration of Sarah Klahn, Exhibit A-40.

²³ Declaration of Maximilian Bricker, Exhibit A

²⁴ Declaration of Maximilian Bricker, Exhibits B-E.

²⁵ The term "TWG participants" is used purposefully here—there are at least four parties to this contested case that have never before participated and were neither informed nor involved in the TWG process. For these entities (Bingham GWD, Bonneville-Jefferson GWD, City of Idaho Falls, and McCain Foods USA, Inc.) the April 21 Orders came without even a minimal warning occasioned by the TWG process.

*Department Witnesses May Rely Upon at the Hearing and Intent to Take Official Notice, (4) Order Denying the Cities' Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions*²⁶,

39. Petitioners are not required to exhaust their administrative remedies because, under I. C. § 67-5271, “[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy.” Alternatively, Petitioners are entitled to judicial review of this matter because the following exceptions to the exhaustion doctrine apply:

- a. The Director’s Orders attempt to proceed upon unlawful procedures and is contrary to the interests of justice. *Fuchs v. State*, 152 Idaho 626 (2012). The time to prepare for this hearing is a denial of due process, and Department procedures must be consistent with due process.
- b. The Director’s proposed procedure is arbitrary, capricious, or an abuse of discretion.
- c. The Director acted outside his authority by ordering curtailment. *Id.* The TWG recognized over 10,000 acres have been hardened within the SWC’s irrigated area. Despite this fact, the Director quantified material injury based on hardened acres, contrary to the Supreme Court’s decision in *A&B v. Idaho Dept. of Water Res.*, 155 Idaho 640, 652, 315 P.3d 828, 840 (2013):

the Director has the duty and authority to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the

²⁶ Declaration of Sarah Klahn Exhibits A-1 through -3, 10, 33 and paragraphs vv-xx.

constitutional requirement that priority of water be extended only to those using the water.

(emphasis added). Additionally, Matt Anders testified that the Department knows that it is delivering water to acres that are hardened. Tr. 107:1 – 108:9.

40. Pursuant to I.C. § 67-5279, a district court must affirm the agency unless it finds that the agency’s findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion.

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011) (quoting I.C. § 67-5279(3)).

41. At an administrative hearing, the presiding officer:

- a. Shall regulate the course of the proceedings to assure that there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary.
- b. Shall afford all parties the opportunity to respond and present evidence and argument on all issues involved, except as restricted by a limited grant of intervention or by a prehearing order.

I.C. § 67-5242(3)(a-b). “I.C. § 67-5242 sets the requirements for a contested case hearing.” *Kuna Boxing Club, Inc. v. Idaho Lottery Comm'n*, 149 Idaho 94, 100 (2009) (finding that even though the agency’s decision was made upon unlawful procedure, I.C. § 67-5279(2)(c), petitioner’s substantial rights were not prejudiced because petitioner asserted it had presented all necessary evidence). Unlike rulemaking, contested case proceedings provide for a full evidentiary hearing.²⁷

²⁷ “Proceedings that apply the IAPA's procedural requirements are much more formal. Under the IAPA, a hearing officer presides in similar fashion to a judge. The officer must regulate the course of the proceedings, assure that all relevant evidence is disclosed, allow for cross-examination if necessary, afford parties the opportunity to present and argue evidence on the issues, and, at his discretion, give non-parties opportunity for oral or written

42. The *2023 Orders* amount to roughly 63 pages of mathematical equations intertwined with law and policy, which constitute significant departures from the *Fourth Methodology Order*.
43. Simultaneously, and before conferring with Petitioners or any other affected parties, the Department filed the *Notice of Hearing*, which set the *2023 Orders* Hearing for June 6 – 10, 2023—60 days from the date of notice, in an irrigation season in which a drought is not predicted.
44. The *Notice of Hearing*, *Scheduling Order*, and *Notice of Materials* do not comply with the procedural requirements associated with hearings under the IAPA, I.C. § 67-5242(3)(a-b). The *Notice of Hearing*, *Scheduling Order*, and *Notice of Materials* fail to consider the intense discovery, evidentiary, and expert requirements necessary “to assure that there is a full disclosure of all relevant facts and issues” and that all parties are afforded “the opportunity to respond and present evidence and argument on all issues involved.” I.C. § 67-5242(3)(a-b).
45. Petitioners’ *Motion for Continuance* and *Motion for Reconsideration of Denial of Continuance* highlight their statutory and constitutional concerns.²⁸
46. The *Notice of Hearing*, *Scheduling Order*, and *Notice of Materials* are: (1) in violation of Petitioners’ constitutional due process rights and the APA; (2) in excess of Respondents’ statutory authority; (3) is made upon unlawful procedure; (4) not

submissions. Further, the officer may exclude evidence on grounds similar to those found in the Idaho Rules of Civil Procedure.” *Land Use And the Lost Promise of Cooper: What Happened to the "Judicial" in Quasi-Judicial Proceedings?*, 44 IDAHO L. REV. 735, 752 (2008).

²⁸ See Declaration of Sarah Klahn, Exhibits A-6 and -31.

supported by substantial evidence on the record as a whole; and (5) arbitrary, capricious, or an abuse of discretion.

47. “It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.” *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 875 (2007).
48. Petitioners have exhausted all administrative remedies and have a right to immediate judicial review pursuant to I.C. §§ 67-5270(2) and 67-5271(2) as a final agency action in this matter will not provide an adequate remedy.

COUNT II

REQUEST FOR DECLARATORY RELIEF: IDWR’S PROPOSED ADMINISTRATIVE PROCEEDING AND PROCESS VIOLATES PETITIONERS’ DUE PROCESS RIGHTS

49. Petitioners re-allege and incorporate the preceding paragraphs by reference as though set forth fully.
50. Water rights are real property rights that come with entitlements to due process before they are administered, curtailed, or taken.
51. Junior water right holders have a right to due process and to provide mitigation. See *Order on Petition for Judicial Review*, at 28-30 (Gooding County Dist. Ct., Fifth Jud. Dist., Case No. 2008-551, July 24, 2009).
52. McCain’s water rights are real property rights and junior to December 31, 1953.
53. McCain only received notice because it shares counsel with the Coalition of Cities who are parties to the underlying action; thus, McCain did not receive notice of the proposed curtailment until after the May 5, 2023, As-Applied Order deadline.²⁹

²⁹ Declaration of Candice McHugh, Exhibit A.

54. McCain’s only option was to join Southwest Irrigation District as there was no time to develop its own mitigation plan contrary to its due process interests.
55. The standard of due process in quasi-judicial proceedings includes “the opportunity to present and rebut evidence.” *Cowan v. Bd. of Comm’rs*, 143 Idaho 501, 506 (2006); *c.f.* *Kuna Boxing Club, Inc. v. Idaho Lottery Comm’n*, 149 Idaho 94, 101 (finding no due process violation because petitioner “had the opportunity to contest all adverse evidence and submit all evidence in its favor”).
56. The *Notice of Hearing, Scheduling Order*, and *Notice of Materials* fail to consider the intense and extensive discovery, evidentiary, and expert requirements necessary to assure Petitioners’ opportunity to present and rebut evidence.
57. Procedural violations in the *Notice of Hearing, Scheduling Order*, and *Notice of Materials* will deprive Petitioners of a meaningful opportunity to be heard and to participate in the hearing, and creates a likelihood that Petitioners will be unconstitutionally deprived of their water rights. Petitioners’ *Motion for Continuance* and *Motion for Reconsideration of Denial of Continuance* highlight their constitutional concerns.³⁰

COUNT III

REQUEST FOR DECLARATORY RELIEF: IDWR’S LIMIT ON THE SCOPE OF DISCOVERY BASED ON THE DELIBERATIVE PROCESS PRIVILEGE IS PER SE UNLAWFUL AND FRUSTRATES PETITIONERS’ ABILITIES TO DEVELOP A FULL AND FAIR RECORD

58. Petitioners re-allege and incorporate the preceding paragraphs by reference as though set forth fully.

³⁰ Declaration of Sarah Klahn, Exhibits A-6 and A-31.

59. Contested case proceedings before the Department are governed by IDAPA 37.01.01.
60. IDAPA 37.01.01.520.02 states that the scope of discovery is governed by the Idaho Rules of Civil Procedure (“IRCP”) 26.
61. IRCP 26 authorizes discovery of “any nonprivileged matter that is relevant to any party’s claim or defense.”
62. “The presiding officer may limit the type and scope of discovery.” IDAPA 37.01.01.521.
63. “Evidence should be taken by the agency to assist the parties’ development of a record, not excluded to frustrate that development.” IDAPA 37.01.01.600.
64. The State of Idaho has not adopted the deliberative process privilege as a bar to discovery. *The Idaho Press Club, Inc., v. Ada County*, Case No. CV 01-19-16277 (Decision and Order, filed 12/13/2019). It is not available as a means to evade or avoid discovery of agency decision-making in Idaho. *Id.*
65. The *Order Denying the Cities’ Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* limited the scope of discovery by precluding Petitioners from asking “questions regarding the Director’s deliberative process on legal and policy considerations.”
66. The *Notice of Materials Department Witnesses May Rely Upon at the Hearing and Intent to Take Official Notice* limits the topics and data that Department witnesses may discuss at the hearing, thereby precluding Petitioners from examining other topics and information the Director relied upon in developing the *Fifth Methodology Order*.
67. Petitioners are attempting to develop facts and evidence for purposes of a hearing set less than six weeks from the Director’s *Notice of Hearing* of the *Fifth Methodology Order*.

68. At the Deposition of Department modeling expert Jennifer Sukow, Ms. Sukow wasn't even provided the *Notice of Deposition Duces Tecum*. Sukow Tr. 14:4-5. Counsel for the Department claimed that any questions "about communications with other staff is part of the Director's deliberative process. So again, I'm going to instruct the witness to not answer that question." Sukow Tr. 16: 9-12. See also Declaration of Sarah Klahn , Exhibit A-47.
69. When Ms. Sukow asked if there was a meeting "within the Department to discuss whether or not to amend the Fourth Methodology Order" (Tr. 40:2-5) counsel for IDWR objected claiming "Again, Candice, that gets to the Director's deliberative process the Department having a meeting on a specific issue." (Sukow Tr. 6-11), see also, Sukow Tr. 90: 18-25- 92:23; Tr: 101-9-14; Tr. 106:11-15.
70. Counsel for the Department continued to object during Mr. Anders Deposition:
- Q: How is a question about whether he had a conversation with the Director about the recommendations before he wrote them up part of the Director's deliberative process?
- MR. BAXTER: I think it gets to -- you know, what pieces did the Director -- you know, whether there was that conversation goes to the Director's deliberative process itself as to what was communicated with the Director.
- (Anders Tr. 48:17-25) See also Decl. of Sarah Klahn, Ex. A-46.
71. The Director is without authority to limit the scope of discovery based on the deliberative process privilege.
72. The Director's limit on the scope of discovery violates IRCP 26 and IDAPA 37.01.01.600.

COUNT IV

REQUEST FOR DECLARATORY RELIEF: IDWR'S LIMIT ON THE SCOPE OF DISCOVERY VIOLATES PETITIONERS' DUE PROCESS RIGHTS

73. Petitioners re-allege and incorporate the preceding paragraphs by reference as though set forth fully.
74. The standard of due process in quasi-judicial proceedings includes “the opportunity to present and rebut evidence.” *Cowan v. Bd. of Comm'rs*, 143 Idaho 501, 506 (2006); *c.f. Kuna Boxing Club, Inc. v. Idaho Lottery Comm'n*, 149 Idaho 94, 101 (finding no due process violation because petitioner “had the opportunity to contest all adverse evidence and submit all evidence in its favor”).
75. The State of Idaho has not adopted the deliberative process privilege as a bar to discovery. *The Idaho Press Club, Inc., v. Ada County*, Case No. CV 01-19-16277 (Decision and Order, filed 12/13/2019). It is not available as a means to evade or avoid discovery of agency decision-making in Idaho. *Id.*
76. The *Order Denying the Cities' Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* limited the scope of discovery by precluding Petitioners from asking “questions regarding the Director’s deliberative process on legal and policy considerations.”
77. The *Notice of Materials Department Witnesses May Rely Upon at the Hearing and Intent to Take Official Notice* limits the topics and data that Department witnesses may discuss at the hearing, thereby precluding Petitioners from examining other topics and information the Director relied upon in developing the *Fifth Methodology Order*.

78. Petitioners have a constitutional and statutory right to discover evidence regarding the Director’s deliberative process. *See Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 780 (9th Cir. 1982) (holding that parties have a constitutional right “to confront all the evidence adduced against [them], in particular that evidence with which the decisionmaker is familiar”).
79. The Director’s limit on the scope of discovery prevents Petitioners’ the opportunity to present and rebut evidence, and thus, violates their due process rights.

COUNT V

WRIT OF PROHIBITION

80. Petitioners re-allege and incorporate the preceding paragraphs by reference as though set forth fully.
81. “A writ of prohibition is only issued by this Court upon a two-part showing by the petitioner that: (1) ‘the tribunal, corporation, board[,] or person is proceeding without or in excess of the jurisdiction of such tribunal[,] corporation, board, or person;’ and (2) ‘there is not a plain, speedy, and adequate remedy in the ordinary course of law.’” *Beck v. Elmore Cty. Magistrate Court (In re Writ of Prohibition)*, 168 Idaho 909, 919 (2021) (*emphasis added*).
82. “[I]n the context of a writ of prohibition, the question of jurisdiction is not merely a question of whether the tribunal had subject matter and personal jurisdiction, but also whether the tribunal had the lawful authority to take the action that it did.” *Beck v. Elmore Cty. Magistrate Court (In re Writ of Prohibition)*, 168 Idaho 909, 919 (2021) (“A court may be prohibited from acting in excess of its jurisdiction when it proceeds in a different manner than that prescribed by a relevant statute.”); *see also Clark v. Meehl*, 98

Idaho 641, 642, 570 P.2d 1331, 1332 (1977) (*Clark*) (pursuant to a writ of prohibition “a court intervenes in judicial or quasi-judicial proceedings to prevent acts or proceedings without or in excess of authority”).

83. “[A] writ of prohibition will issue only if no plain, speedy and adequate remedy at law is available.” *Clark*, 98 Idaho at 642; *see also* I.C. § 7-402; *Beck*, 168 Idaho at 928 (stating an adequate remedy “must be evident, obvious, simple or not complicated”).
84. As described above in Counts 1 – 4, Respondents are proceeding without or in excess of their jurisdiction by establishing an administrative proceeding and process, and a limitation on discovery, that violates the APA, IRCP, and Petitioners’ procedural due process rights.
85. There is no plain, speedy and adequate remedy at law available to Petitioners to prevent Respondents’ violation of the APA, IRCP, and Petitioners’ procedural due process rights. Petitioners have exhausted their administrative remedies.
86. Petitioners are entitled to a writ of prohibition that restrains Respondents from asserting the deliberative process privilege and from conducting the *2023 Orders* Hearing on the currently scheduled date, and which establishes that Petitioners are entitled to entry of a new more reasonable scheduling and discovery order that does not violate the APA, IRCP, and Petitioners’ procedural due process rights.
87. Alternatively, Petitioners request the Court issue an order requiring the Department to show cause as to why a writ of prohibition should not be issued.

COUNT VI

WRIT OF MANDAMUS

88. Petitioners re-allege and incorporate the preceding paragraphs by reference as though set forth fully.
89. “Water rights are real property, I.C. s 55-101, and as such may be protected by injunction, mandamus or prohibition when threatened by irreparable [sic] injury.” *Olson v. Bedke*, 97 Idaho 825, 830, 555 P.2d 156, 161 (1976) (quoting *Anderson v. Cummings*, 81 Idaho 327, 340 P.2d 1111 (1959); and cf. *Heibron v. Last Chance Water Ditch Co.*, 17 P. 65 (Cal. 1888)).
90. “Mandamus may be resorted to whenever an officer or person refuses to perform a duty enjoined by law, although the act may have been an isolated one, disconnected with any proceedings leading up to that which the recalcitrant official or individual refused to perform.” *Henry v. Ysursa*, 148 Idaho 913, 917, 231 P.3d 1010, 1014 (2008).
91. The Director has a duty under the APA in contested cases to provide proper notice and opportunity for Petitioners to present evidence.
92. The Director has a duty to allow junior water right holders to mitigate for their portion of any material injury under Idaho law prior to curtailment.
93. Director Spackman refuses to perform his duties under the APA.
94. Petitioners are entitled to a writ of mandamus ordering Director Spackman to provide proper notice, permit Petitioners to collect evidence relevant to their claims through the discovery process, and present such evidence during an evidentiary hearing conducted consistent with the APA.

95. Alternatively, Petitioners request the Court issue an order requiring the Department to show cause as to why a writ of mandamus should not be issued.

REQUEST FOR ATTORNEYS' FEES AND COSTS

96. Respondents' proposed actions are without reasonable basis in law or fact.

97. Petitioners have retained counsel to prosecute this action on its behalf and request that the Court award them reasonable attorneys' fees and costs pursuant to I.C. §§ 12-117, 12-120, and 12-121, or other applicable law.

PRAYER FOR RELIEF

WHEREFORE, Petitioners request the following relief:

- A. For the entry of a Declaratory Judgment that the Director was without authority to schedule the *2023 Orders* Hearing without giving due consideration to the intense discovery, evidentiary, and expert requirements necessary "to assure that there is a full disclosure of all relevant facts and issues" and that all parties are afforded "the opportunity to respond and present evidence and argument on all issues involved." I.C. § 67-5242(3)(a-b).
- B. For the entry of a Declaratory Judgment that the (1) *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery*, (2) *Scheduling Order and Order Authorizing Remote Appearance at Hearing*, (3) *Notice of Materials Department Witnesses May Rely Upon at the Hearing and Intent to Take Official Notice*, and (4) *Order Denying the Cities' Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* are improper pursuant to the APA, IRCP, and a violation of Petitioners' due process rights.

- C. For the entry of a Writ of Prohibition restraining Respondents from enforcing the hearing dates and scheduling contained in the *Notice of Hearing, Notice of Prehearing Conference, and Order Authorizing Discovery and Scheduling Order and Order Authorizing Remote Appearance at Hearing*. Alternatively, an order requiring the Department to show cause as to why a Writ of Prohibition should not be issued.
- D. For the entry of a Writ of Prohibition restraining Respondents from enforcing the discovery limits in the *Order Denying the Cities' Motion for Appointment of Independent Hearing Officer and Motion for Continuance and Limiting Scope of Depositions* and *Notice of Materials Department Witnesses May Rely Upon at the Hearing and Intent to Take Official Notice*. Alternatively, an order requiring the Department to show cause as to why a Writ of Prohibition should not be issued.
- E. For the entry of a Writ of Mandamus ordering Director Spackman to provide adequate notice to Petitioners of the issues to be decided, permit Petitioners to collect evidence pursuant to the discovery rules consistent with the Idaho Rules of Civil Procedure, and present such evidence during an evidentiary hearing conducted consistent with the 5th and 14th Amendments to the U.S. Constitution, Art. I, Sec. 18 of the Constitution of Idaho, and APA. Alternatively, an order requiring the Department to show cause as to why a Writ of Mandamus should not be issued.
- F. For entry of Order awarding attorneys' fees and costs.
- G. For such further relief as the Court determines is just and proper under the circumstances.

Respectfully submitted this 19th day of May, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of May, 2023, I caused to be filed a true and correct copy of the foregoing document via iCourt E-File and Serve, and upon such filing, the following parties were served via electronic mail:

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